

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition of the Association for Local)
Telecommunications Services (ALTS) for a)
Declaratory Ruling Establishing Conditions)
Necessary to Promote the Deployment of)
Advanced Telecommunications Capability)
Under Section 706 of the Telecommunications)
Act of 1996)

CC Docket No. 98-78

JOINT REPLY COMMENTS OF
THE ASSOCIATION OF LOCAL TELECOMMUNICATIONS SERVICES,
e.spire COMMUNICATIONS, INC., and
INTERMEDIA COMMUNICATIONS, INC.

THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS ASSOCIATION
e.spire COMMUNICATIONS, INC., AND
INTERMEDIA COMMUNICATIONS, INC.

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SUMMARY

ALTS' Petition presents the Commission with a pro-competitive approach to achieving the goals of Section 706 of the 1996 Act. In stark contrast to Section 706 petitions filed by the RBOCs, which seek to decouple the interconnection and unbundling requirements of the 1996 Act from their provision of advanced telecommunications services, ALTS submits that what is needed is an aggressive attempt to assist the efforts of new entrants to provide advanced services ubiquitously by ensuring that they have cost-based access to ILEC advanced network equipment and facilities. Simply put, RBOCs suggest that ubiquitous deployment of advanced services can best be accomplished by a return to monopoly, while ALTS suggests that unfettered competition between ILECs and CLECs – assisted by the interconnection and unbundling requirements of the 1996 Act – will best spur all players to expand the coverage of their advanced services to all Americans.

Among the non-ILEC commenters, there was remarkable unanimity in support of ALTS' approach to Section 706 issues. IXC, CLECs and ISPs alike asked the Commission to adopt both the philosophy and specific proposals incorporated in the ALTS petition. They spoke virtually as one in urging the Commission not to relegate the terms of the 1996 Act to voice services and yesterday's analog circuit-switched technology. The competitive players point out that voice and data networks are swiftly converging into a single digital, packet-switched network. If the Act is to be regarded as a dynamic instrument, as was intended by Congress, its dictates must apply equally to new and old technologies. This requires the Commission to reform its collocation rules, specify data network interconnection arrangements, and clearly define data-related UNEs.

Not surprisingly, ILECs were nearly as unanimous in their opposition to the ALTS Petition. Despite the fact that none of them have chosen to develop advanced services out-of-region, where they could offer service on the lightly regulated basis they claim to prefer, ILECs continue to argue that the threat of regulatory oversight is somehow retarding their efforts to deploy advanced services within their existing service territories. However, none of them offer a coherent explanation of how their proposals better effectuate the pro-competitive purposes of the 1996 Act than the ALTS approach. As importantly, none of them was able to provide a persuasive explanation of how the forbearance they seek can be granted at this time, in light of express statutory requirements making full implementation of the 1996 Act's interconnection, unbundling and resale requirements a strict precondition to any grant of forbearance.

Thus, the vast majority of commenters agree that the Commission must resist the admittedly tempting "deal" offered by the ILECs. In the end, the purposes of Section 706 – universal deployment of advanced services – will be best served by vibrant competition, not by a return to monopoly. ALTS respectfully suggests that the Commission should remain squarely focused on that mission by granting the ALTS petition, and rejecting the ILECs requests to jettison critical portions of the 1996 Act as they pertain to advanced telecommunications services.

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INTERMEDIA COMMUNICATIONS, INC.**

The Association for Local Telecommunications Services ("ALTS"), e.spire Communications, Inc. ("e.spire"), and Intermedia Communications, Inc. ("Intermedia"),¹ by their attorneys, jointly submit these replies to the comments filed by parties in the above-captioned proceeding.²

¹ e.spire and Intermedia are members of ALTS.

² See *Public Notice*, Pleading Cycle Established for Comments on Association for Local Telecommunications Services Petition for Declaratory Ruling Regarding Section 706, DA 98-1019 (June 3, 1998). ALTS filed its Petition on May 27, 1998. Initial comments were filed on June 18, 1998.

Introduction

ALTS/e.spire/Intermedia note that the comments reflect a rare convergence of views among the competitive community. Competitive local exchange companies (“CLECs”),³ interexchange carriers (“IXCs”)⁴ and information service providers (“ISPs”)⁵ all agree that ALTS’ proposed package of reforms to facilitate competition through Section 251(c) interconnection, unbundling and resale, collocation reform, and coordination with State commissions, represents the best way – from a technological, legal or policy perspective – to achieve the goals of Section 706. Only the incumbent local exchange carriers (“ILECs”), who baselessly insist that the 1996 Act was terminally ill upon arrival and cannot apply to technologies deployed after the date of its enactment, disagree.⁶

This convergence of views mirrors the convergence taking place in both the established telecommunications networks of the ILECs and IXCs and in the newly deployed networks of CLECs. As described in an article in Tuesday’s *New York Times* that discusses Cisco Systems’ decision to shun a potential partnership with Lucent Technologies or Northern Telecom,

The basic architecture of big communications networks is evolving toward an emphasis on data rather than voice traffic. That shift is forcing a *convergence* – and new competition – between makers of data networking equipment, like Cisco, and older telephone-based

³ See, e.g., *Level 3 Comments*, *KMC Comments*, *Hyperion/USN Comments*, *Nextlink Comments*.

⁴ See, e.g., *CompTel Comments*, *WorldCom Comments*, *LCI Comments*, *Sprint Comments*, *MCI Comments*, *AT&T Comments*.

⁵ See, e.g., *Commercial Internet Access Exchange Comments*.

⁶ See, e.g., *US West Comments*, at 11, 14. U S West devotes an entire section of its comments to its argument that “The Unbundling and Discounted Resale Requirements of Section 251(c) Do Not Apply to Advanced Data Services Because They Are Not ‘Telephone Exchange Service or Access Service’”. ALTS/e.spire/Intermedia will reply to this baseless contention below.

companies like Lucent and Northern Telecom. "As this consolidation occurs . . . [v]oice traffic is going to come under a data infrastructure"⁷

For those with pre-existing networks, such as the ILECs, new digital technology will be layered over and inserted into (to replace outmoded or failing equipment) the network. To the degree that digital and analog, or data and voice, traffic appear separable today, technology will blur that line as existing networks naturally evolve into a hybrid, interwoven fabric of analog and digital technology and equipment.

Based on these technological imperatives, the possibility of enforceable regulatory separation of ILECs' analog and digital facilities and services is a mere fallacy. Sections 251(c) and Section 706 make such a proposal legally unsupportable, as well. Any attempt to achieve such separation would result in the irrational deployment of new technologies and would deny consumers the benefits of efficient deployment and widespread availability of advanced services that would result from the deployment of advanced services subject to the interconnection, unbundling and resale obligations of Section 251(c). Moreover, the unfounded and unprecedented creation of such a regulatory divide would require a hideous tome of regulation designed to stem the resulting tacitly authorized transition of ILEC monopolies from the 1996 Act/analog side to the new unregulated and unfettered monopoly/digital side of the proposed ILEC regulatory divide. Clearly, Congress did not intend for the 1996 Act to be used to replace the old ILEC analog monopolies with new ILEC affiliate digital monopolies. Nor did it

⁷ *Cisco Systems Is Giving Up Partner Hunt*, New York Times, June 23, 1998 at D1 (quoting John T. Chambers, Chief Executive Officer, Cisco Systems, Inc.) (emphasis added). ALTS/e.spire/Intermedia note that grant of RBOCs' pending requests for an unregulated digital monopoly seriously could compromise innovation and competition in the equipment industry as the five – or perhaps four, three, two . . . – remaining RBOCs surely could pick winners and losers in that industry.

contemplate the creation of a mile-high mountain of regulation designed to hold the bar as ILECs hurdle over the 1996 Act into a new unregulated frontier.

The American consumer deserves better. Congress and the Administration realized this when they amended the Communications Act with the 1996 Act. Competitors – and consumers – must share in the advantages of incumbency. Section 251(c) assures – and Section 706 commands – this result. Today's telecommunications revolution rests largely on evolution – evolution toward digital technology and evolution toward a deregulated competitive paradigm. To bring the benefits of this revolution beyond downtown and the office park, the Commission must hold firmly to Section 251(c). Section 251(c) provides the foundation for broad-based competition and the widespread deployment of advanced telecommunications capabilities. Already, competition has spurred ILECs into playing "catch-up" in the deployment of advanced services. Without competition, ILECs would have had no incentive to unshelve advanced technologies (SONET and xDSL technologies are not new). To ensure that competition and the resulting deployment of advanced services reach the broadest possible spectrum of American consumers, Congress provided for three methods – interconnection, unbundling and resale – through which (or through any combination thereof) competitors could share in the advantages of incumbency. Section 706 requires that the Commission rebuff ILEC attempts to shut any of them down. ALTS/e.spire/Intermedia respectfully suggest – and everyone but the ILECs agrees – that the best way to do this is by granting the specific requests for relief made in the ALTS Petition.

I. ALTS AND ITS MEMBERS SUPPORT THE UBIQUITOUS DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES

A. Section 251(c) Already Provides the Best Way to Ensure Widespread Deployment of Advanced Telecommunications Infrastructure

The comments reveal a near universal confirmation that CLECs, today, are deploying their own digital equipment, including DSLAMs, data switches and other advanced technologies, that make it possible for them to bring broadband services to “on-net” customers.⁸ Responding to competition, ILECs are following suit with their own digital/broadband deployment plans.⁹ However, simple economics (and Section 251(c)) demand that CLECs be able to share in ILEC efficiencies derived from controlling a network (not just bottlenecks) built with a century-long monopoly revenue stream.¹⁰ On this point, only the ILECs disagree.¹¹ And they do so without

⁸ See, e.g., *WorldCom Comments*, at 6 (MFS pioneered the use of IDSL to replace circuit-switched ISDN service); *Level 3 Comments*, at 2; *Hyperion/USN Comments*, at 3.

⁹ See, e.g., *SBC Comments*, at 7-10 (confirming ALTS’ view that ILECs are playing catch-up when it comes to deploying advanced telecommunications capabilities); *Nextlink Comments*, at 3-4 (explaining that ILECs are responding to CLEC deployment of advanced technologies). In its comments, U S West falsely charges that ALTS ignores ILEC investments. ALTS/e.spire/Intermedia respond by repeating that such investment is a welcome development that proves (1) that competition is beginning to take hold and Section 251(c) is beginning to work, and (2) that the pending RBOC Section 706 petitions merely are ploys through which the RBOCs hope to be able to extract monopoly rents for the provisioning of advanced telecommunications services. Most commenters agree. See, e.g., *LCI Comments*, at 4 (explaining that ILECs do not need any additional investment incentives).

¹⁰ See, e.g., *KMC Comments*, at 3-5 (agreeing with ALTS’ view that competition depends on access to existing infrastructure).

¹¹ See, e.g., *Ameritech Comments*, at 7. Ameritech claims that there is no “need for the Commission to require that the new ILEC investment in advanced telecommunications capability be made available to CLECs pursuant to the provisions of Sections 251(c)(3) or (4).” Thus, Ameritech admits that digital facilities and services are subject to Section 251(c), but merely requests that it be excused from providing them on an unbundled or resale basis. Ameritech fails to provide a plausible legal basis upon which its request could be granted.

plausible legal, technical or policy justifications.¹² However, to bring competitive access to advanced services to the widest possible market (absent universal service reform), the Commission must clarify and reiterate that the interconnection, unbundling and resale obligations of Section 251(c) apply to *all* ILEC advanced services and facilities. Again, most commenters agree.¹³ Indeed, the statute makes no distinction between analog and *digital* interconnection, unbundling and resale. If it did, the ability of competitors to deploy advanced telecommunications services would be impeded severely. As WorldCom notes, without Section 251(c) access to digital technologies, CLECs will not be able to compete with a full panoply of broadband services.¹⁴

Similarly, most commenters recognized that CLECs must be able to rely on advanced service UNEs and resale if they are going to compete effectively for customers beyond the

¹² Ameritech, for example, suggests that, if “eager CLEC investors were given the choice of either risking their own capital or that of the ILECs – at TELRIC rates amounting to a 50-60% discount below actual costs”, CLECs would slow investment in their own facilities. *Id.*, at 7-8. Discounting the ridiculous proposition that TELRIC results in rates that are 50 percent or more below costs, and the strange assumption that CLEC investors could risk *ILEC* capital, there is little to this argument other than an unsubstantiated concern that facilities-based competition will not develop. Fortunately, Section 251(c) make facilities-based entry the most financially attractive option in cases where duplication of the ILEC network is economically justified. Where full duplication is not economically rational, entry through the use of UNEs still provides a more financially attractive option than resale.

¹³ See, e.g., *CompTel Comments*, at 4 (“By taking action to force the ILECs to implement Section 251 for all technologies, including data technologies, the Commission increases opportunities for additional players to enter advanced telecommunications markets and to expand their own advanced networks to a wider geographic region.”); *WorldCom Comments*, at 10 (describing the three statutory pathways to providing competitive advanced service offerings).

¹⁴ *WorldCom Comments*, at 7; see also *Level 3 Comments*, at 3 (“The full potential of [TCP/IP-based] networks cannot be realized unless their operators can obtain technically efficient and economically reasonable access to the bandwidth of the embedded loop network.”).

current reach of CLEC network facilities.¹⁵ Unless CLECs are afforded the statutorily mandated option of using UNEs and resale to bring advanced services to residential and smaller non-urban customers, ILECs will be able to perpetuate their monopolies over services and customers for which facilities-based duplication of ILEC networks currently is economically infeasible. Only the ILECs dispute this fact.¹⁶ Worse still, without competitive pressure from the CLEC industry, ILECs will have little or no incentive to make good on promises to bring advanced services to customers currently outside the reach of CLEC networks.¹⁷ Nothing could be further from achieving the goals of Section 706.

There also was widespread recognition by commenters that Section 706 contemplates that both the Commission and the States will have an important role in creating the proper regulatory environment for the deployment of advanced telecommunications services.¹⁸ SBC, however, suggest that the possibility of 50-plus sets of rules governing the provisioning of advanced telecommunications services would be untidy and should be quashed in one super-statutory swoop by the Commission.¹⁹ However, the bulk of commenters maintain that Commission forbearance effectively would strip the States of statutorily-prescribed jurisdiction and would undermine the shared jurisdictional framework established by Congress. Moreover, as noted by KMC, Intermedia and e.spire in each of their initial comments, the States have

¹⁵ See, e.g., *LCI Comments*, at 4 (“CLEC access to xDSL technology is essential if consumers are to have a choice of broadband service providers”).

¹⁶ See, e.g., *AT&T Comments*, at 1; *KMC Comments*, at 3-5; *Hyperion/USN Comments*, at 3; *LCI Comments*, at 4; *WorldCom Comments*, at 5; *Sprint Comments*, at 1-2.

¹⁷ See *Level 3 Comments*, at 3 (“Without [Section 251(c)] access, only businesses that can afford high-capacity facilities will be able to benefit from the full potential of Internet-based information and other packet-switched telecommunications services.”)

¹⁸ See, e.g., *TRA Comments*, at 9; *KMC Comments*, at 7-8.

¹⁹ See *SBC Comments*, at 19-21 (referring to “scattered state rulings”).

developed expertise and policies that are essential to the full realization of Section 706's goal of creating a regulatory environment best suited to bringing advanced telecommunications capabilities to all Americans.²⁰

In the end, Section 251(c)-based competition is the best and only way to bring advanced services to residential, rural and urban business customers. Without it, farms in Iowa and subdivisions in Texas will be waiting for a bridge to the 21st century that their monopoly provider has no real economic incentive to build.

B. The Comments Confirm That Competition Is the Only Incentive Needed to Spur ILEC Investment in Advanced Telecommunications Services

The comments filed by the ILECs merely confirm their efforts to capture excessive profits by removing – in any way they can devise – advanced services from the scope of Section 251(c).²¹ The ILECs responded to the ALTS Petition by reiterating their threat that, unless they receive something greater than the reasonable profit associated with cost-based UNE pricing or the better than reasonable profit buried in the avoided cost wholesale discount associated with resale pricing, they will limit their investments in advanced telecommunications services.²² BellSouth, for example, suggests that the statutorily prescribed CLEC entry and ILEC compensation mechanisms of Section 251 be scrapped in favor of a “wholesale strategy” wherein BellSouth can charge prices that would compensate it “for assuming the investment risk

²⁰ *KMC Comments*, at 7-8; *Intermedia Comments*, at 7; *e.spire Comments*, at 10.

²¹ *See, e.g., GTE Comments*, at 4, 16 (indicating GTE's view that ADSL is a jurisdictionally interstate exchange access service, and that offering ADSL to competitors as a tariffed access service, somehow satisfies any statutory obligation it might have with regard to its provision of those services).

²² It is worth noting that, implicit in the ILECs' argument, is the assumption that State commissions will not set rates properly.

associated with innovation and would reflect the value to CLECs of avoiding that investment risk.”²³ However, this formula ignores the fact that TELRIC pricing guarantees cost recovery plus a reasonable profit.²⁴ It also ignores the fact that TELRIC pricing principles prevent ILECs from extracting monopoly rents.

BellSouth, like other ILECs, paints a heady picture of its ongoing and planned investment in advanced telecommunications infrastructure.²⁵ These claims only affirm what ALTS stated in its Petition: RBOCs need no additional incentives for investment in advanced telecommunications infrastructure – they are making substantial investments already. Most commenters agree.²⁶ And, Bell Atlantic confirms that “even absent regulatory relief Bell Atlantic plans a fairly wide roll-out of xDSL” in the same metropolitan areas where it is beginning to experience competition from CLECs.²⁷

Many commenters confirmed the view that Bell Atlantic’s claim that “it needs regulatory relief to broaden the scope of its advanced broadband deployment” is merely a hollow attempt to relieve it from competition and grant it the ability to extract monopoly rents in markets where it has not yet begun to feel the pressure of competition.²⁸ To date, ILECs have reacted to CLEC deployment of advanced services. With Section 251(c) in place, CLECs will soon need to react

²³ *BellSouth Comments*, at 2, n.3.

²⁴ As is now standard, the ILEC filings included their usual attacks on the Commission’s TELRIC pricing model. For example, Bell Atlantic argues that TELRIC allows recovery of little more than “original costs”. *Bell Atlantic Comments*, at 6. Ameritech takes the ILECs’ standard TELRIC argument to new levels of absurdity by submitting that TELRIC rates amount “to a 50-60% discount below actual costs”. *Ameritech Comments*, at 8.

²⁵ *Id.* at 2-3.

²⁶ *See, e.g., LCI Comments*, at 4.

²⁷ *Bell Atlantic Comments*, at 8.

²⁸ *See, e.g., KMC Comments*, at 3-5; *LCI Comments*, at 4.

to the investments of these awakening giants. In short, competition will spread and, as each side ups the ante with innovations and investments, the reach of advanced telecommunications infrastructure will spread, too. Contrary to the claims of the ILECs, the three methods of entry prescribed by Congress in Section 251(c) do not inhibit this process. Rather, the mix of options available to competitors merely ensures that ILECs must share the benefits of incumbency. It also ensures that consumers will be given more options at lower prices than they would if the RBOCs' Section 706 Petitions were granted and they were allowed to transform themselves into unregulated monopolies.

C. Section 251(c) Creates UNE and Wholesale Markets for ILEC Advanced Facilities and Services and, Thus, Establishes a Way for ILECs to Recover a Portion of Their Network Development Costs From Competitors

ALTS/e.spire/Intermedia note that the ILEC comments continue to misrepresent the risks associated with their investments in advanced telecommunications infrastructure. Bell Atlantic, for example, claims that it "will have more incentive to invest in xDSL and other advanced technologies when it is freed from regulatory rules that limit its ability to earn a return that is commensurate with the risks of those investments."²⁹ At the same time, Bell Atlantic reports to the investment community that it expects to realize billions in annual revenues from the construction of a "'next generation' LD data network" that will involve capital expenditures of approximately \$100 million a year for five years.³⁰ This hardly seems risky. In fact, it seems

²⁹ See, e.g., *Bell Atlantic Comments*, at 6.

³⁰ Merrill Lynch Investment Report on Bell Atlantic Corp., at 1 (dated June 9, 1998).

quite lucrative. Merrill Lynch agrees: its current and long term recommendations to investors are to “BUY” Bell Atlantic stock.³¹

Bell Atlantic and the other ILECs conveniently ignore the fact that Section 251(c) provides an additional layer of risk protection for ILECs and their investors. By creating UNE and wholesale markets for ILEC advanced facilities and services, Section 251(c) actually provides ILECs with a means of recovering a portion of their network development costs from competitors. As a result, ILEC risk is reduced and the incentives to deploy advanced capabilities, as contemplated by Section 706, are increased. In short, Section 251(c) creates a relatively risk-free environment for ILEC investments in advanced telecommunications infrastructure. It seems as though the only real risk ILECs face is not being able to extract monopoly rents on their investments.

II. THE 1996 ACT IS A DYNAMIC, LIVING DOCUMENT – ILEC ATTEMPTS TO SNUFF-OUT COMPETITION BY INTERPRETING IT AS A STATIC SNAPSHOT MUST BE REBUFFED

The ILECs’ comments reveal that it is imperative that the Commission act promptly to quash ILEC efforts to limit the applicability of the 1996 Act to their networks and facilities as they existed on February 8, 1996.³² Congress clearly did not intend for the 1996 Act to apply

³¹ *Id.*

³² See, e.g., *Bell Atlantic Comments*, at 6 (arguing that Bell Atlantic’s investment in new and advanced technology should not be “subject to the investment-detering rules in place for the *current* network” (emphasis added)).

only to ILEC facilities and services in place on the date of enactment. If it did, the 1996 Act would expire as soon as ILECs replaced and updated existing plant with digital technology. Without firm Commission leadership, GTE, Bell Atlantic, U S West , Ameritech, SBC and other ILECs will continue to stymie the deployment of advanced telecommunications infrastructure by arbitrating and litigating this issue in dozens of venues and jurisdictions. While ALTS/e.spire/Intermedia are confident that ILECs ultimately will lose these battles, the Commission could do much to advance local competition – and the deployment of advanced service capabilities – by issuing the declaratory ruling requested by ALTS.

A. The Act Is Technology-Neutral and Applies Equally to Voice and Data – Section 251(c) Obligations Extend to New and Emerging Technologies

The ILEC comments repeat their support for a regulatory structure that would accord different treatment to facilities and services based on their use of specific types of technology.³³ However, ALTS/e.spire/Intermedia agree with AT&T, MCI and other commenters who expressed the view that “[i]t cannot be seriously doubted that Sections 251, 252 and 271 of the

³³ U S West, for example, correctly notes that Section 251(c)(2) of the 1996 Act requires it to provide interconnection for the transport and termination of “telephone exchange service” and “exchange access”. *U S West Comments*, at 11-17. However, U S West argues that the only traffic that can meet these definitions is voice traffic that is switched through a central switching complex and that interconnects all users in a given geographic area. *Id.* at 15. U S West bases its analysis in large part on the definition of “exchange” that was established in an FCC order issued nearly twenty years ago (in 1980) – an order that was issued before frame relay, ATM, xDSL and other advanced technologies and services even existed, and predates the 1996 Act. *Id.* at 16 (citing *Domestic Public Radio Svc.*, Second report and Order, 76 FCC 2d 273, 281-82, Paras. 13, 14 (1980)).

Telecommunications Act apply to advanced data networks and services.”³⁴ As AT&T aptly explained:

Section 251(c)(3) obligates the ILECs to “provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis” “Network element,” in turn is defined broadly in Section 3(a)(45) as a “facility or equipment used in the provision of a telecommunications service” (including “features, functions, and capabilities that are provided by means of such a facility or equipment”). And “telecommunications service” is defined in relevant part as the “offering of telecommunications . . . regardless of the facilities used,” with “telecommunications” meaning “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Thus the statute on its face applies to all telecommunications services and facilities, including data networks and services, and does not carve out any exceptions for new, broadband, data, or any other telecommunications services³⁵

In sum, because “section 251 makes no distinctions between facilities used to provide voice and data services or between traditional and advanced services,”³⁶ the interconnection, unbundling and resale obligations of Section 251(c) apply to all ILEC digital, data and broadband service offerings. The ILECs have not demonstrated any plausible rationale for arguing that Section 251(c) distinguishes between voice and data, analog and digital, new and old technologies, or pre-existing and post-enactment services and facilities. Both Congress and

³⁴ *AT&T Comments*, at 5; *see also MCI Comments*, at 3-6.

³⁵ *AT&T Comments*, at 5.

³⁶ *MCI Comments*, at 4; *see also WorldCom Comments*, at 3-5; *Nextlink Comments*, at 7-8; *Intermedia Comments*, at 2-3.

the Commission³⁷ have rejected such distinctions and have recognized that no defensible regulatory scheme could be based on them.³⁸

B. Bottleneck Facilities Remain Bottlenecks – Regardless of When They Were Created or How They Evolve

The fact that voice and data originate over the same bottleneck facility – whether it is a raw copper loop or a loop that employ IDLC technology, xDSL electronics, or any other form of enhancement – compels the conclusion that the technology does not change the nature of the ILECs' Section 251(c) obligations. Bottleneck facilities remain bottlenecks – regardless of when they were created or how they evolve. Only the ILECs appear to disagree.³⁹

³⁷ In its own Section 706 Petition, U S West took a different position than it did in its comments filed in this proceeding and confirmed that the Commission also did not recognize such a distinction in its *Local Competition Order*. *U S West Section 706 Petition*, at 45 (“the Commission’s unbundling and resale rules have so far not drawn any distinction between incumbent LECs’ voice networks and service offerings, on the one hand, and their packet-switched networks and data services on the other”). ALTS/e.spire/Intermedia note that because U S West neither appealed the Commission’s *Local Competition Order* on that basis, nor petitioned for reconsideration on that point, its new theory of Section 251 must be rejected as an untimely petition for reconsideration of the *Local Competition Order*.

³⁸ Notably, through the WTO, the United States is committed to treating both packet-switched data transmission services and circuit-switched data transmission services as “basic telecommunications services” subject to full procompetitive interconnection at “cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require” See www.wto.org/wto/services/tel02.htm (Communications from the United States, dated Feb. 12, 1997).

³⁹ See, e.g., *GTE Comments*, at 5 (“there is no compelling evidence that Congress intended to include advanced data networks and their individual components as potential “bottleneck” facilities when it crafted the 1996 Act”).

C. The Act Defines “UNE” Broadly to Include All Basic Network Functions – Regardless of Whether a Bottleneck Exists

The ILEC comments continue their attempt to sell the unfounded theory that Section 251(c) obligations do not extend beyond bottleneck facilities.⁴⁰ However, in enacting Section 251(c), Congress considered the economics of competition and all of the advantages of incumbency – and it decided that the transition from a monopoly provider paradigm to a competitive provider paradigm would require a leveling of the playing field. Thus, Section 251(c) represents Congress’ essential determination that, if a broad array of American consumers were going to be able to reap the benefits of local services competition, incumbents would have to share many of the benefits of incumbency with competitors. Since the advantages of incumbency are pervasive, Section 251(c) creates obligations well beyond natural bottlenecks. In short, Congress realized that the transition from a monopoly provider paradigm to a competitive provider paradigm would require interconnection, unbundling and resale that – like the advantages of incumbency – extend well beyond the natural bottleneck that is typically equated with the local loop. The Commission itself confirmed this when it declared SS7 signaling, operator services, directory assistance, and interoffice transport to be UNEs despite the presence of competitive alternatives for each of these services in many markets.

Thus, even if, as SBC contends, the market for advanced services already is competitive (which it is not), that fact would not relieve SBC of its Section 251(c) – or Section 271 – obligations with respect to advanced digital facilities and services. As Congress and the Commission already have recognized, Section 251(c) obligations depend not on where the bottleneck ends, but rather, on where the advantages associated with incumbency end.

⁴⁰ See, e.g., *Ameritech Comments*, at 7.

III. FCC INTERVENTION IS REQUIRED BECAUSE ILECs ARE STALLING COMPETITION IN THE ADVANCED SERVICES MARKET BY REFUSING TO PROVIDE SECTION 251(c) INTERCONNECTION, UNBUNDLING AND RESALE FOR DIGITAL FACILITIES AND SERVICES

The comments confirm ALTS' already well-documented position that ILECs are stalling competition in the advanced services market by refusing to provide Section 251(c) interconnection, unbundling and resale for digital facilities and services. Although the ILECs generally deny that this is true, ALTS/e.spire/Intermedia note that Bell Atlantic, for example, conveniently fails to indicate whether the type of interconnection it is providing is merely tariffed interconnection or is the cost-based interconnection as required by Section 251(c). It also is worth noting that many ALTS members have begun renegotiating frame relay interconnection agreements that are approaching their two-year expiration dates. In these negotiations, several ILECs already have begun backpedaling and have indicated their unwillingness to renew terms agreed to only two years ago.

The comments of several competitors also belie claims, such as that made by Bell Atlantic, that it "has not only met the Act's requirements for interconnection, unbundling and collocation, it has exceeded them."⁴¹ TCG, for example, reports that, for more than six months, TCG has been unable to get Bell Atlantic to provide HDSL compatible loops.⁴² WorldCom, MCI and Nextlink also submit that ILECs are stonewalling CLECs from obtaining access to xDSL capable loops and electronics.⁴³ WorldCom also notes that Covad has had tremendous

⁴¹ *Bell Atlantic Comments*, at 9.

⁴² *TCG Comments*, at 3.

⁴³ *WorldCom Comments*, at 6, 12 ("most ILECs are not provisioning *any* DSL-conditioned loops upon reasonable request"); *MCI Comments*, at 7, n.11 ("The BOCs'/ILECs' refusal to allow CLECs to collocate xDSL equipment, or assessment of excessive collocation charges is tantamount to a denial of access of xDSL-conditioned loops.").

difficulties in obtaining DSL-capable loops from Bell Atlantic, and that “BellSouth now charges CLECs in Georgia a non-recurring charge of \$600 per DSL-capable loop order, in addition to excessive recurring charges for such loops.”⁴⁴ Notably, ILEC intransigence extends well beyond their refusal to provide access to unbundled xDSL-conditioned loops and electronics. TCG, for example, confirms that like, e.spire and Intermedia, “it has been rebuffed by several ILECs in its efforts to interconnect its frame relay network” with the ILECs’ data networks.⁴⁵

It also is worth noting that the availability of advanced service interconnection, UNEs and resale is critical to CLEC business plans. Intermedia and e.spire have invested heavily in data switches and frame relay capabilities. Level 3 has built “the first end-to-end network designed . . . specifically for Internet Protocol based services.”⁴⁶ Network Access Solutions is one of many “next generation CLECs” “formed specifically to provide telecommunications service to end users based on the family of [xDSL] technologies.”⁴⁷ ALTS/e.spire/Intermedia believe that the business plans of these CLECs indicate that CLECs – in addition to spurring ILEC investments in advanced telecommunications infrastructure – have played and will continue to play an essential role in realizing Section 706’s goal of making advanced telecommunications capabilities available to all Americans.

⁴⁴ *WorldCom Comments*, at 12, n.21.

⁴⁵ *Id.* at 4.

⁴⁶ *Level 3 Comments*, at 2.

⁴⁷ *Network Access Solutions Comments*, at 1.

IV. ILECs HAVE NOT DEMONSTRATED THAT FORBEARANCE WOULD BE MORE EFFECTIVE THAN COMPETITION IN FOSTERING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITIES

Deregulating a monopoly provider does not lead to competition. No matter how many times the ILECs deny it, Congress realized that more must be done to facilitate the transition from a monopoly provider paradigm to a competitive provider paradigm. To carry a theme, ALTS/e.spire/Intermedia repeat that the advantages of incumbency did not disappear on the day the 1996 Act was signed into law. Indeed, they hardly have dissipated since then. Nevertheless, USTA, for example, conveniently ignores the advantages that ILECs' derive from incumbency and their history as monopoly providers when it argues that [m]arket forces alone must drive competition.⁴⁸

ALTS/e.spire/Intermedia note that TRA and CompTel share with ALTS a better reasoned view that accords with congressional intent as manifested in the structure of the statute, as well as with basic economic theory. In support of the ALTS Petition, TRA submits that "[r]egulatory efforts should be focused on fostering local competition through elimination of the many remaining obstacles to competitive provision of local exchange/exchange access service" which will, in turn, generate "market forces that will ensure the broad availability of advanced telecommunications services."⁴⁹ CompTel aptly notes that ALTS and the RBOCs have presented the Commission with two fundamentally different approaches to Section 706:

One approach – illustrated by the ALTS petition – holds that increasing competition will spur all providers to deploy the most advanced technologies in the most rapid manner possible. This

⁴⁸ USTA Comments, at 6.

⁴⁹ TRA Comments, at 4-5.

approach asks the Commission to ensure that open and fair access is provided by the ILECs, so as to let those competitive forces free.

The other approach – illustrated by the BOC petitions – declares competition a failure and anoints the BOCs as the sole source of advanced telecommunications capabilities. It asks the Commission to grant the BOCs favorable treatment in order to “encourage” them to bring advanced services to the public.⁵⁰

CompTel wisely suggests that the Commission should choose ALTS’ plan and “choose competition over monopoly, openness over exclusive access, opportunity for all over special treatment for some.”⁵¹

A. The RBOCs’ Uniform Failure to Deploy Out-of-Region Impeaches ILEC Claims That Regulation Has Precluded Investment

In their comments, the ILECs continue to offer their now familiar argument that regulation is holding them back from investing and innovation. Bell Atlantic, for example, submits that either (1) the Commission must deregulate new technologies, or (2) if the Commission fails to deregulate, the regulations simply do not apply.⁵² Nevertheless, Bell Atlantic insists that regulations (presumably Section 251(c)) – that either should be rolled-back or, in the alternative, do not apply – are inhibiting its deployment of advanced telecommunications services.⁵³ Specifically, Bell Atlantic states that “[d]eregulation of new technologies, not the extension of regulation to them, will fulfill the Congressional intent of encouraging the widespread deployment of advanced technologies.”⁵⁴ While the RBOCs

⁵⁰ *CompTel Comments*, at 2.

⁵¹ *Id.*

⁵² *Bell Atlantic Comments*, at 7.

⁵³ *Id.*

⁵⁴ *Id.*

typically split their “heads I win, tails you lose” arguments between the States and the Commission, ALTS/e.spire/Intermedia find Bell Atlantic’s current brazen approach refreshingly candid. However, Bell Atlantic’s new approach lends neither credibility nor merit to its argument.

Bell Atlantic’s own actions belie any claim that regulation is holding it and other ILECs back and suggest that competition is the only thing pushing them forward. For more than two years, Bell Atlantic has had the same opportunities that CLECs have had outside its home territory. Yet, like SBC, Bell Atlantic has ventured outside its home territory only to expand its ILEC service territory and eliminate a major potential competitor through a blockbuster RBOC merger. Even within its territory, Bell Atlantic admits that its roll-out of xDSL will be limited to metropolitan areas in which it is beginning to feel competitive pressure from CLECs. As Bell Atlantic explains, its xDSL roll-out will be limited to “areas where demand is proven [by CLECs] and the costs of reaching customers is fairly low.”⁵⁵

Thus, it appears that it is simple economics – bolstered by the fact that it has thus far managed to stem the expansion of CLEC entry beyond major metropolitan markets – and not regulation that is holding Bell Atlantic back. ALTS/e.spire/Intermedia agree and suggest that more competition through full implementation of Section 251(c) will cure this problem for Bell Atlantic.

B. Forbearance Would Be Counterproductive as It Would Prevent CLEC Competition for “Off-Net” Customers

Many commenters confirmed ALTS’ view that all three methods of Section 251(c) competitive entry are necessary to expand competition for advanced telecommunications to “off-

⁵⁵ *Id.* at 8.